No. 10-141

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ABDUL KARIM HASSAN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BEFORE JUDGMENT IN THE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment's equal protection and due process guarantees trumped or implicitly repealed the invidious national origin discrimination against naturalized American citizens that is contained in the Constitution's natural born provision?

2. Whether the Citizenship Clause of Section 1 of the Fourteenth Amendment trumped or implicitly repealed the invidious discrimination against naturalized American citizens that is contained in the Constitution's natural born provision?

LIST OF PARTIES

The Petitioner is Abdul Karim Hassan.

The Respondent is The United States of America.

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I.

OPINION BELOW

The opinion of the district court is not reported but a copy is reprinted in the Appendix to the Petition ("App.") at 1a-10a. The Second Circuit Court of Appeals has not issued any opinions – certiorari is being sought before judgment in the Court of Appeals.

II.

JURISDICTION

The judgment of the United States District Court, Eastern District of New York (App. 11a-13a) was entered on June 18, 2010. The notice of appeal (App. 14a-15a) was filed on June 28, 2010. The case was docketed in the Second Circuit Court of Appeals on June 30, 2010, as No. 10-2622-cv. (App. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

This Court will be asked to directly decide for the first time ever whether the Fifth and Fourteenth Amendments trumped or implicitly repealed the invidious discrimination against naturalized citizens contained in the natural born provision.

1. The Natural Born Provision

The natural born provision is contained in Article II, Section I, Clause 5, of the Constitution which states that:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

2. The Fifth Amendment

The Fifth Amendment reads in relevant part as follows:

> No person shall .... be deprived of life, liberty, or property, without due process of law ...

While not appearing in the text of the Fifth Amendment, the U.S. Supreme Court has held that:

> [t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995).

3. The Fourteenth Amendment

Section 1 of the Fourteenth Amendment reads in relevant part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

IV.

STATEMENT

Based on United States Census Bureau data, as of the year 2000, there were 10.6 million naturalized American citizens. (Hassan Declaration, Ex. 18). As such, because the natural born provision of the U.S. Constitution invidiously discriminates against all naturalized American citizens in terms of eligibility for the U.S. Presidency, this is one of the largest cases of invidious discrimination in the history of the United States and involves the highest office in the land. Furthermore, as far is known, this is the first time ever that a naturalized American citizen has challenged the validity of the natural born provision in light of the equal protection guarantees of the Fifth Amendment and the equalization of natural born and naturalized citizenship under the Fourteenth Amendment. As such, this case presents significant constitutional issues of first impression for the Supreme Court to decide. In fact, since the abolition of slavery, the natural born provision represents the only and most

widespread form of invidious discrimination that remains in our Constitution.

1. The Underlying Facts

Petitioner Abdul Karim Hassan ("Hassan") is a thirty-six year old naturalized American citizen who was born in the country of Guyana and whose race is East Indian. Hassan came to the United States in 1990 and has resided in New York State ever since. Hassan intends to run for the Office of Presidency of the United States in the year 2012. Hassan has done everything he can practically and reasonably do such as setting up his presidential websites. However, before Hassan can go any further in his presidential campaign, he needs a judicial declaration that the natural born provision of the U.S. Constitution has been trumped or implicitly repealed by the Fifth and Fourteenth Amendments. As the district court pointed out, Hassan has met all the requirements for the Presidency except the requirement of natural born status. (App. 5a). The natural born provision invidiously discriminates against naturalized American citizens by allowing only natural born American citizens to be President. By contrast, the equal protection component of the Fifth Amendment, through Supreme Court interpretation, specifically prohibits the federal government from discriminating against American citizens because of their naturalized status and in favor of natural born citizens. Unlike almost every other candidate for the Presidency, Hassan cannot reasonably and effectively raise money or campaign for votes and support without first obtaining a ruling that he can serve as President. Because much time is

needed to plan and execute a national campaign for the Presidency, time is truly of the essence and an appeal to the Supreme Court before judgment in the Court of Appeals is the only realistic scenario in which Hassan can practically run for President in 2012.

2. The District Court Proceedings

On March 5, 2008, Hassan filed a declaratory judgment action against the United States of America in the United States District Court for the Eastern District of New York. In essence, Hassan sought a declaration that the natural born provision of the United States Constitution was trumped or implicitly repealed by the First, Fifth, Fourteenth and Fifteenth Amendments of the Constitution. Defendant USA moved to dismiss at the pre-answer stage on the basis that Hassan did not have standing and that the natural born provision is not trumped by the First, Fifth, Fourteenth and Fifteenth Amendments. Hassan cross-moved for summary judgment. The district court granted the government's motion to dismiss and denied Hassan's motion for summary judgment. Because only the Fifth and Fourteenth Amendment arguments are raised on appeal, the arguments based on the First and Fifteenth Amendments will not be discussed.

Hassan argued before the district court that the Fifth Amendment is in irreconcilable conflict with the natural born provision because the Fifth Amendment as interpreted by the U.S. Supreme Court specifically prohibits discrimination against naturalized citizens in favor of natural born citizens.

See *Afroyim v. Rusk* 387 U.S. 253, 262 (1967) (stating without exception as to presidential eligibility or the natural born provision that "[The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native"). See also *Schneider v. Rusk*, 377 U.S. 163, 165 (1964), (rejecting the argument that, "it is not invidious discrimination for Congress to treat such naturalized citizens differently from the manner in which it treats native-born citizens"). Hassan further argued that this conflict should be resolved in favor of the Fifth Amendment's equal protection guarantee especially in light of the current national public policy against national origin discrimination, the liberty and justice goals set out in the Constitution, and the fact that the Supreme Court has described the assumption on which the natural born provision is based as, "impossible for us to make." *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). The statute at 4 U.S.C. § 7201(b) states in relevant part that:

> It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, *or national origin*. The President shall use his existing authority to carry out this policy.

The above statute specifically instructs the President to carry out the policy against employment discrimination based upon national origin – it is therefore truly absurd to discriminate based on

national origin as to the job of President as the natural born provision does – even more justification to resolve the conflict in favor of the Fifth Amendment. A few years before *Afroyim*, the U.S. Supreme Court in *Schneider v. Rusk*, 377 U.S. 163, 168 (1964), emphatically rejected the purported factual basis for the natural born provision when it stated in relevant part that:

> This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make.

The government in its papers argued that the natural born provision was adopted because of distrust of foreigners. However, because the Supreme Court in *Schneider* concluded that such a distrust assumption is "impossible" to make, the foundation of the natural born provision has been destroyed by the Supreme Court and it can no longer stand when confronted by the equal protection guarantee of the Fifth Amendment. In *Schneider*, the Supreme Court classified the discrimination against naturalized citizens as invidious. Invidious national origin discrimination like that contained in the natural born provision is so offensive to America's public policy and society that it is

subjected to strict scrutiny review[1]. *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

Under the Fourteenth Amendment, Hassan argued that the Fourteenth Amendment removed the discrimination against naturalized citizens as contained in the natural born provision. The Supreme Court in *Afroyim*, 387 U.S. at 262, held that the Fourteenth Amendment was intended to completely control the status of citizenship and created a single citizenship that cannot be diluted – an indication that the natural born provision lost any control over the status of citizenship and could not therefore relegate naturalized citizens to second class status.

As to Defendant's argument that Hassan did not have standing, this was easily rejected by the district court after which the merits of the case were considered. On the merits, the district court at the outset stated that, "Likely because of the rarity of such challenges, the Supreme Court has not established a test for determining whether or when one constitutional provision "trumps," as plaintiff argues, another." This statement it seems set the tone for the entire decision below which seems to

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[1] While strict scrutiny is applied to determine whether statutes and lower level authorities violate the Fifth Amendment, as the district court pointed out, this Court has never adopted a test to resolve conflict between different parts of the constitution. However, strict scrutiny is evidence of the anti-discrimination public policy of the nation and can be very helpful in resolving the conflict between the Fifth Amendment and the natural born provision in favor of the Fifth Amendment's equal protection and due process guarantees.

indicate that the interpretation Hassan is seeking can only come from the Supreme Court. The absence of a standard as pointed out by the district court also led to a critical error by the district court – in determining whether the subject amendments conflicted with the natural born provision, the district court seem to have read the amendments as they were literally written and not as they have been interpreted by the U.S. Supreme Court – although it was only in the last few decades that the Supreme Court interpreted the Fifth Amendment as containing an equal protection guarantee and interpreted the Fourteenth Amendment as having complete control over the status of citizenship.

The district court's approach seem to ignore the fact that most of the key changes in American society and constitutional law have been the product of judicial interpretation – with the most important of these coming from the Supreme Court. This obvious fact of American constitution law was reinforced by a recent discussion at the National Constitutional Center in Philadelphia on March 8, 2008. U.S. Supreme Court Justice Ruth Bader Ginsburg took part in the discussion, moderated by journalist Lynne Stewart, and made the following statement on the role of interpretation (Hassan Decl. ¶ 25):

> JUSTICE RUTH BADER GINSBURG: The constitution starts out with three beautiful words, We The People. But who were the people? They were White property owning men. The genius of this Constitution, and I think this place

(National Constitution Center) displays that so marvelously, is that over the years, this concept of we the people which, that was once a very elite group has become more and more expansive, so people who were once held in human bondage became part of we the people, Native Americans, women, it took until 1920 for women to get the right to vote, through the 19th amendment. *But I think Lynne, its not so much the amendment process that's done it - but a revised understanding of certain basic things like the equal protection of the law,* like due process of the law, like 8th Amendment cruel and unusual punishment. Just to see the difference, you can go visit the jail they have in Williamsburg Virginia and see the various instruments of mild torture that are there. Today that will be considered cruel and unusual without any doubt. The equal protection clause became part of the constitution in 1868 - did it mean that women were to be treated as citizens equal in stature to men? Well, that was 1868 and they did not get to vote until 1920, but would we say today that that equality principle means that all people would be judged by what they can do, not by their birth status not by the color of their skin, not by their gender, yes it means that today, so its taking these general

> clauses, my view of the founding fathers is that that was really their vision for the nation, they did not write a constitution that was to last for one generation, so that I think is the genius of the constitution, we the people of the united states in order to form a more perfect union, and we are still forming that more perfect union.

Justice Ginsburg's mention of the Fourteenth Amendment and gender equality is an excellent example of the importance of judicial interpretation in clarifying and confirming constitutional rights. As Justice Ginsburg noted, when the Fourteenth Amendment was adopted in 1868 it was clearly not intended to protect people on the basis of gender – she aptly noted that women did not get the right to vote until 1920. However, today, the Fourteenth Amendment as well as the Fifth Amendment, are both interpreted as prohibiting inequality on the basis of gender. As such, even if the Nineteenth Amendment was never adopted, women would have had the right to vote through judicial interpretation. In fact, the well-established equal protection component of the Fifth Amendment does not appear in the text of the Amendment and was itself the product of judicial interpretation. *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 217 (1995) ("[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment"). The Fifth Amendment trumps the natural born provision for the same reasons the Supreme Court read equal protection into the Fifth

Amendment – equal protection is now the foundation of American society especially as America becomes more and more diverse.

Even though the equal protection guarantee of the Fifth Amendment was the foundation of Hassan's argument, the district court only mentioned it in a footnote in its decision. (App. 8a). Furthermore, the district court incorrectly referred to the Fifth Amendment's equal protection guarantee and the other amendments as "generalized principles." (App. 7a). Constitutional equal protection is not a generalized principle - it is a sweeping mandate that is the foundation of American society and it is what distinguishes America from other countries in the world.

Significantly, in its opposition/reply papers, the government provided no analysis in opposition to Hassan's Fifth Amendment argument even though it provided analysis in opposition to Hassan's other arguments. Moreover, the district court completely ignored and failed to address *Afroyim v. Rusk* 387 U.S. 253, 262 (1967), the last known case to mention the issue of discrimination against naturalized citizens and in which the U.S. Supreme Court stated without exception as to presidential eligibility and/or the natural born provision that:

> (The naturalized citizen) becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native.

The government's unsurprising inability to substantively oppose petitioner's Fifth Amendment argument and the district court's inability or failure to address or distinguish *Afroyim* is a clear and obvious indications that petitioner's Fifth Amendment argument is obviously correct. It seems that by the time the government began working on its opposition to Hassan's motion and reply on its motion, it realized that to substantively oppose Hassan's Fifth Amendment equal protection arguments would be to undermine the civil rights gains the government itself has secured for the American people over the last several decades.

Importantly, time and history are very significant as well. Anti-discrimination was not always the public policy of the Untied States and invidious discrimination was not always viewed as an absurd result under the liberty and justice goals of the Constitution. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Hirabayashi v. United States*, 320 U.S. 81 (1943) *Korematsu v. United States*, 323 U.S. 214 (1944). This is why cases cited by Defendant from the nineteenth and first part of the twentieth centuries have little or no precedential value on issues of discrimination like we confront in this case.

3. Proceedings on Appeal

On June 28, 2010, Hassan filed a notice of appeal to the United States Court of Appeals for the Second Circuit. (App. 8a-9a). The court of appeals has jurisdiction pursuant to 18 U.S.C. 3742(b). Plaintiff's notice of appeal was timely filed within

the 30 days allowed by Federal Rule of Appellate Procedure 4(b)(1)(B). The appeal was docketed in the court of appeals on June 30, 2010, as No. 10-2622. App, infra, 27a. The case is therefore "in the court[] of appeals" within the meaning of 28 U.S.C. 1254. See Robert L. Stern, et al., Supreme Court Practice § 2.4, at 75 (8th ed. 2002).

V.

REASONS WHY THE PETITION SHOULD BE GRANTED

In seeking a grant of certiorari before judgment in the Court of Appeals, Hassan understands that he must establish not only that the case should be reviewed by the U.S. Supreme Court but that it should be reviewed before judgment in the Court of Appeals. The extraordinary circumstances of this case satisfy both these stringent requirements. It is a rare occurrence when this Court is presented with a case that deals only with the constitution, with the highest office in the land, with national elections and with invidious discrimination against more than ten million American citizens - all at the same time. Significantly, because much time and effort is needed to plan and execute a run for the Presidency in 2012, and because of the delays inherit in litigation, Hassan will only be able to effectively run for the Presidency if this Court issues a ruling before judgment in the Court of Appeals.

Upon information and belief, the Supreme Court has denied petitions for certiorari from Mr.

Leo Denofrio and Mr. Philip J. Berg in different cases involving the natural born provision. Both these gentleman sought to continue the discrimination in the natural born provision but were rejected by this Court. Here however, Hassan seeks to end the discrimination contained in the natural born provision. Here, Hassan is not challenging anyone's presidential eligibility under the natural born provision – Hassan himself is the injured party and is challenging the validity of the natural born provision itself in light of the equal protection guarantee of the Fifth Amendment and the citizenship clause of the Fourteenth Amendment.

A petition for a writ of certiorari before judgment in a case pending in a Court of Appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11. This case satisfies that strict criterion.

1. **Certiorari Should be Granted Because This Court Is Yet to Develop A Test for Resolving Conflicts Between Different Parts of the Constitution, As The District Court Itself Pointed Out**

Certiorari should be granted because this case presents questions of constitutional law that as a practical matter can only be answered by the Supreme Court. In its decision, the district court stated in relevant part that, "Likely because of the rarity of such challenges, the Supreme Court has not established a test for determining whether or when

one constitutional provision "trumps," as plaintiff argues, another." (App. 5a). The district court did not complain about an absence of a test from the Court of Appeals – it complained about the absence of a test from the Supreme Court. The Second Circuit is also likely to complain about the lack of guidance from the Supreme Court. As a practical matter therefore, this Court should provide the lower courts with the guidance the district court requested, before waiting for the court of appeals to render judgment – a judgment which should be based on guidance from this Court.

2. Certiorari Should be Granted Because The Fifth Amendment's Equal Protection Guarantee Is the Product of This Court's Interpretation and This Court Is Uniquely Suited To Decide Whether Its Interpretation Trumps The Natural Born Provision.

In addition to a test for resolving constitutional conflicts, only this Court can effectively determine the scope of the Fifth Amendment's equal protection guarantee. While the text of the Fifth Amendment does not contain equal protection language, in the last several decades or so, the Supreme Court in *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n. 2, (1975) for the first time stated 'explicitly that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."' *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995). As such, only this Court

can effectively clarify its interpretation of the Fifth Amendment as containing an equal protection guarantee and state whether under said interpretation, the Fifth Amendment's equal protection guarantee trumps the discrimination contained in the natural born provision.

3. **Certiorari Should be Granted Because We Are Dealing With A National Office and National Elections And Only a National Court Like The Supreme Court Can Issue Rulings That Are Binding Nationally - Across All Fifty States That Help Administer The Elections For President.**

Because this case deals with the highest national office in the form of the Presidency, and the supreme law of the land in the form of the Constitution, only the highest court in the land, the Supreme Court, can adequately resolve the dispute present in this case. An election for the Presidency is a national election and the only one that spreads across all eleven circuits of the Court of Appeals. As such, a ruling by the Second Circuit will likely not provide relief to Hassan in the other circuits where Hassan must also run, and as such, only the Supreme Court can provide the nationwide resolution that is absolutely needed in a nationwide presidential election. In fact, the government itself recognized this problem and argued in the district Court that a ruling by the lower court may not be binding on other states etc. Even though the presidential elections are national, ballot access and the election itself are controlled by each of the states.

As such, a ruling in the Second Circuit may not be followed by a state outside the Second Circuit. By contrast, a ruling by the Supreme Court must be followed by all the states.

4. Certiorari Should be Granted For the Same Reasons The Supreme Court Granted Direct Review in *Bolling v. Sharpe*

The invidious discrimination at issue herein is the type of important constitutional issue that warrants a grant of certiorari before judgment in the Second Circuit. In *Bolling v. Sharpe* 347 U.S. 497, 498 (1954), Supreme Court stated in relevant part that, "The Court granted a writ of certiorari before judgment in the Court of Appeals because of the importance of the constitutional question presented." In *Bolling*, the racial segregation policy of a Washington D.C. public school was challenged. After the challenge was dismissed by the district court, the Supreme Court granted certiorari before judgment in the Court of Appeals. The instant case and *Bolling* both dealt with invidious discrimination – in *Bolling* the invidious discrimination was based on race and here, the invidious discrimination is based on national origin. However, the instant case is much more compelling than *Bolling* in one critical aspect that makes this case also worthy of direct review by the Supreme Court. The number of persons in 1954 that were affected by the racial segregation policies in Washington D.C. was approximately 100,000[2]. By

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[2] Based on census data, the current population of Washington D.C. is approximately 600,000 persons. Even if we use this

contrast, the number of people who are affected by the invidious discrimination against foreign-born citizens in this case is more than 10 million based on census data. If invidious discrimination against 100,000 persons in a single district is worthy of direct review (as it should be), invidious discrimination against 10 million Amercian citizens across the entire nation is also worthy of review before judgment in the Court of Appeals.

The need for direct review of such widespread invidious discrimination is even greater where deadlines are involved. Here, Hassan intends to run for the Presidency in 2012. As such, if Hassan is forced to await a judgment of the Court of Appeals before he or the government petitions this Court to grant certiorari, Hassan will as a practical matter, not have enough time to run for President. For example, if this Court grants the instant petition, Hassan is likely to get a ruling on the merits before June 2011 – thereby still leaving time for a realistic presidential run. However, while this Court generally decides all cases before its session ends in June, cases in the Court of Appeals may take years, thereby not leaving enough time for a presidential run. Given the nature of a presidential run and the fact that it spans all fifty states as well as the territories and possessions, preparation for a presidential run must begin well in advance of the elections and petitioner cannot realistically run in

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same figure as the population of the Washington D.C. in 1954, and assuming 50 percent of the population were African-American, and further assuming that about 1/3 of African-Americans were of school age, we have about 100,000 persons.

light of the natural born provision which prevents him from being president as the district court held.

The government may be tempted to argue that the invidious discrimination against foreign-born American citizens has existed for centuries and there should be no rush to address it now. However, the discrimination in *Bolling* or a worse form of it was also in existence for hundreds of years until it was finally challenged in the 1950s. The Supreme Court's grant of direct review in *Bolling* confirms that even though invidious discrimination existed for a long time, when such invidious discrimination is challenged, it should be reviewed expeditiously and with all deliberate speed, especially where as here, the number of persons directly affected exceeds ten million. Given the large number of persons affected, this is probably one of the largest cases of invidious discrimination ever in the history of the United States – this fact alone makes the petition for direct review very compelling.

5. Certiorari Should be Granted For the Same Reasons The Supreme Court Granted Certiorari in *Korematsu v. United States* and *Hirabayashi v. United States*

Certiorari should be granted because this case involves invidious national origin discrimination on a national scale. In *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944), this Court granted certiorari because, in those cases, like here, we are dealing with national origin discrimination on a wide scale.

While being denied the chance to serve as President is not as bad as being forced to live in an internment camp, this case presents other factors that make the petition for certiorari here more compelling. In *Hirabayashi* and *Korematsu*, the discrimination was limited in geography to only certain parts of the country and to the length of the conflict. Here however, the discrimination is not limited – it applies to over ten million American citizens across the entire country, has lasted for over two hundred years already and unless declared invalid by this Court, will last forever.

6. Certiorari Should be Granted For the Same Reasons The Supreme Court Granted Direct Review in *U.S. v. Nixon*, and Expedited Review in *Bush v. Gore*

Certiorari should be granted because this case presents an extremely important constitutional question about the highest office in the land. In *U.S. v. Nixon*, 418 U.S. 683 (1974), President Nixon asserted executive privilege in a failed attempt to quash certain subpoenas issued by the special prosecutor. This Court granted certiorari before judgment in the Court of Appeals to review the discovery dispute. Even though this Court rarely reviews discovery disputes, it did so because said dispute involved the Office of the President. Here, this case not only involves the Office of the President – it also involves millions of American citizens and significant constitutional questions of invidious discrimination – seemingly more important issues than the discovery dispute in *Nixon*.

In *Bush v. Gore*, 531 U.S. 98 (2000), this Court confirmed that uncertainty about the Presidency should not linger, and generally, presidential eligibility should be decided forthwith. In *Bush*, this Court granted certiorari about three times in a matter of days, held oral arguments and issued a very expeditious decision that resolved the issue of who should become President in the 2000 presidential elections. Like *Bush*, this case deals with massive uncertainty as to the qualifications for President by pitting the natural born provision against the Fifth and Fourteenth Amendments.

President Gerald Ford described the Nixon resignation from the Presidency and the period preceding it as a "long national nightmare." The uncertainty of the year 2000 presidential election controversy in Florida was described with a million unpleasant adjectives and in a May 2008 interview with Tim Russert on MSNBC, Supreme Court Justice Antonin Scalia said that the Florida situation made us the "laughing stock of the world." (Hassan Decl. ¶ 26 – Excerpt of Interview). Interestingly, Justice Scalia, explained that the "laughing stock" image was one of the reasons the U.S. Supreme Court handled *Bush v. Gore*, 531 U.S. 98 (2000), on an expedited basis and issued a final ruling to stop the vote counting rather than returning the case to the Florida courts to craft a solution. (Hassan Decl. ¶ 26 – Excerpt of Interview). As explained below, the natural born provision is not only being used to make America the laughing stock of the world by trying to undermine candidates like John McCain, but it is being used to jeopardize national security because members of the military

are invoking the natural born provision against President Obama in refusing to serve in the military by challenging the President's legitimacy under the natural born provision as explained below.

7. Certiorari Should be Granted Because Even Congress Has Highlighted The Need For Resolving The Natural Born Issue

The issues concerning the natural born provision are of great public importance, interest, impact and action especially in recent years. Ironically, as far as is known, the natural born provision is the only disputed part of the constitution that Justices of this Court have been questioned about in public hearings before Congress. Interestingly, the only time that the Justices of the Supreme Court are required to answer questions in public is during budget appropriation hearings before Congress. On March 13, 2008, Justice Clarence Thomas and Justice Anthony Kennedy appeared before the House Appropriations Sub-Committee, with Rep. Jose E. Serrano as the Chairman. As part of his introductory statement, Chairman Serrano stated in relevant part as follows[3]:

> *Chairman Jose Serrano:* And for those of you who were trying to figure out what we were discussing for a few minutes, we did not make any major

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[3] The excerpt can be found at page 101 of the transcript of the second session of March 13, 2008 Hearing.

> decisions on anything. Although I must say, on a personal level, that for about 10 years, I have been trying to get out of you an unofficial comment on whether or not someone born in Puerto Rico can serve as President. And from what I understand from a California case, you may have to decide on Senator McCain. So if you do, I will try to get myself included in the same thing.

Chairman Serrano has always reiterated his respect for the justices and always treats them with deference before his sub-committee – as should be the case. Justices of the Court also generally refrain from discussing issues before the Court or that may come before the Court. As such, this case provides the ideal vehicle for this Court to answer the questions Congress has been posing for years about the natural born provision – an answer that will directly affect more than 10 million naturalized American citizens as well as Chairman Serrano.

Chairman Serrano's mention of Senator McCain's case further highlights the dramatic impact the natural born provision is having on the public and presidential elections and candidates. In fact, both Senator McCain and President Obama have been dramatically impacted by the natural born provision and to the detriment of the nation. As to Senator McCain who was the 2008 Republican Presidential nominee, he was born in the Panama Canal Zone. Because of this he faced court challenges claiming he was born outside the United States and therefore ineligible to be President under

the natural born provision. While these challenges put candidate McCain and his campaign through considerable expense and distraction, they also likely created some uncertainty among members of the voting public and the effect could not have been good for the country and our democratic system of government. Unfortunately, unless this Court reviews and resolves the issues raised by the natural born provision, the disruptions to our system of presidential elections will continue and to the immense detriment of the country.

As to President Obama, he and by extension, the whole nation, continue to suffer because of the misuse of the natural born provision especially by those that belong to so-called "birther" movements. On July 27, 2009, CNN published the following story featuring White House Press Secretary Robert Gibbs[4]:

> July 27, 2009 Gibbs shoots down 'birthers' Posted: 06:47 PM ET From CNN Ticker Producer Alexander Mooney (CNN) — A reluctant Robert Gibbs struck back sharply Monday at those who continue to question whether President Obama was born in the United States, saying nothing the White House can do will put the issue to rest. "No, the God's honest truth is no — let's understand this," Gibbs, the White House press secretary, said when

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[4] See http://politicalticker.blogs.cnn.com/2009/07/27/gibbs-shoots-down-birthers/?fbid=IJCCneh-WCP

> a reporter asked if there is anything more the administration can do to satisfy those who question where the president was born. "I almost hate to indulge in such an august setting as the White House briefing room discussing the made up fictional nonsense of whether the president was born in this country," Gibbs continued. "A year and a half ago, I asked that the birth certificate be put on the Internet. Because Lord knows if you got a birth certificate and you put it on the internet, what else could be the story? "Here's the deal. If I had some DNA, it wouldn't assuage those who don't believe he was born here," Gibbs also said. "I have news for them and all of us. The president was born in Honolulu, Hawaii, the 50th state of the greatest country on the face of the earth. He is a citizen."

The birthers also claim President Obama is ineligible to serve as president under the natural born provision because at the time of his birth he held both American and British citizenship – his father was from the former British colony of Kenya. The natural born issue has even made its way into the military. On April 13, 2010, the U.S. Army announced that it would court-martial Army doctor Lt. Col. Terrence Lakin for refusing to report to duty and be deployed to Afghanistan. Lakin asserted that due to citizenship issues, President Obama is not legally the Commander in Chief, and therefore lacks

the authority to send him to Afghanistan[5]. Such conduct by members of the military jeopardizes national security and the lives of Americans. Things are getting very dangerous and unless this Court offers guidance on this issue, the danger to the nation will increase. In fact, there have been numerous lawsuits by politicians and activists challenging President Obama's eligibility under the natural born provision to serve as President. If this Court denies review and allows things to continue along this dangerous path, we can have a domino effect where every act by the President, in every area is challenged – next we may even have people invoke the natural born provision to challenge the authority of judges appointed by President Obama.

If this Court finds that the natural born provision is indeed trumped by the Fifth and Fourteenth Amendment, the problems tied to the natural born provision should disappear. Even if this Court disagrees with Hassan and finds that the natural born provision is not trumped - in the interest of the nation, I hope the government would join me in asking this Court to clarify that Americans such and Republican Senator John McCain and Democratic President Barack Obama are not barred by the natural born provision from being President.

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[5]See http://voices.washingtonpost.com/right-now/2010/05/the_birther_colonel_takes_his.html and http://www.nydailynews.com/news/national/2010/04/14/2010-04-4_birther_lt_col_terry_lakin_to_be_courtmartialed_for_refusing_order_to_deploy_to_.html

8. Certiorari Should be Granted Because a Ruling in This Case Will Also Clarify The Rights of Over 100 Million Women Who Are Also Seemingly Barred By Article II, Section I, From Being President

Certiorari should be granted because a ruling in this case will also affect female candidates for the Presidency – a potential class of over 100 million. While Article II, Section I, Clause 5 of the Constitution bars naturalized American citizens from being Presidency, Article II, Section I, Clause 1, seems to bar women from holding the Presidency as well. Article II, Section 1, Clause 1, uses the words "he" and "his" in referring to the President and states as follows:

> The Executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President chosen for the same Term, be elected, as follows:

If this Court rules that the equal protection guarantee of the Fifth Amendment trumps the discrimination against naturalized citizens in Article II, Section I, Clause 5 (natural born provision), it naturally follows that discrimination against women in Article II, Section I, Clause 1, is also trumped by the Fifth Amendment – under current constitutional jurisprudence, gender and national origin discrimination are both prohibited by the Fifth Amendment. Former presidential candidate Hilary Clinton was sued during the 2008 elections based on

the use of the words "He" and "his" in Article II, Section 1, Clause 1. A grant of certiorari in this case would allow this Court to eliminate the uncertainty over the eligibility of women to serve as President of the United States.

9. Certiorari Should be Granted Because the District Court Incorrectly Decided Significant Constitutional Issues of First Impression and Major Public Importance

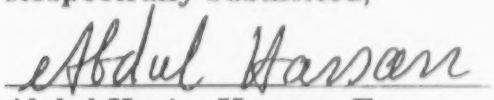
In conjunction with the above points, this Court should grant certiorari before judgment in the Court of Appeals because the district court incorrectly decided extremely significant constitutional issues of first impression as further laid out under "Statement" of the case above . The significance of the issues presented here should not be in doubt – we are dealing with several parts of the constitution, the highest office in the land and invidious discrimination against more than 10 million naturalized American citizens. This is most likely one of the largest cases of invidious discrimination ever in the history of the United States, with significant public interest and impact.

VI. CONCLUSION

Based on the foregoing, Petitioner kindly request that this Honorable Court grant his petition for certiorari before judgment in the Court of Appeals, together with such other, further and different relief as the Court deems just and proper.

Dated: Queens Village, New York
July 20, 2010

Respectfully submitted,



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FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ JUN 15 2010 ★
BROOKLYN OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ABDUL KARIM HASSAN,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA,

Defendant.

----------X

MEMORANDUM AND ORDER
08-CV-0938(NG)

GERSHON, United States District Judge:

Abdul Karim Hassan, a naturalized citizen of the United States and a *pro se* lawyer in this action, asserts that he intends to run for President of the United States in 2012. Article II, Section 1, clause 5, of the United States Constitution, which provides that "[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President," stands in the way. Hassan concedes that, as a naturalized citizen, he is not a "natural born citizen" as that language has been interpreted. However, he argues that the First, Fifth, Fourteenth and Fifteenth Amendments

"trump[]" the natural-born citizen requirement, and he seeks a declaratory judgment to that effect. Defendant the United States of America moves to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(bX6), arguing (1) that Hassan's claim does not meet Article Ill's "case or controversy" requirement; and (2) that Hassan's arguments fail on the merits. Hassan moves for summary judgment. In essence, he seeks a declaratory judgment that he is eligible to run for President, and, if elected, to serve.

DISCUSSION

Ripeness and Standing

The government, which does not seriously dispute Hassan's contention that he intends to run for President, nevertheless argues that the steps Hassan has taken toward his campaign which consist primarily of securing internet domain names -are too minimal to support Article III standing or ripeness. In the years between the complaint and the time when Hassan may be refused the Presidency, the government contends, "any number of intervening events will likely render the dispute moot." For example, Hassan may change his mind, lose in a primary or lose the general election. Given the range of potential outcomes, the government suggests that Hassan could bring suit under Article III only after he was elected when he was denied the office of Presidency.

What the government overlooks is that Hassan's alleged injury is not contingent on the outcome of the election; his injury is the denial of his right to run for election with his own knowledge and that of voters that he is eligible to serve as President of the United States. His ability to run for election is significantly compromised if he cannot take office.[1] Given Hassan's intention to run, his alleged injury caused by the Natural Born Citizen Clause is sufficiently "concrete and particularized" and "actual or imminent" to support Article III standing in this case. *See Int'l Action Ctr. v. City of N.Y.*, 587 F .3d 521, 529 (2d Cir. 2009).

As for ripeness, the contention that Hassan is required to wait until he won the election to bring suit under Article III is an overly broad reading of the ripeness requirement. In *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980), the Second Circuit concluded that a judge in New York state court could challenge as unconstitutional three New York provisions that effectively required a judge to resign from his position if he sought political office, even though the plaintiff had taken not yet taken steps toward his candidacy. Although the plaintiff in *Signorelli* faced sanctions if he ran for office and tested the scope of

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[1] The government argues that Hassan is technically not prevented from running for office; he is merely prevented from taking office if elected in 2004. It notes, as an example, that Roger Calero, a non-citizen, ran for President as a representative of the Socialist Workers Party, even though he could not have taken office had he won. That Calero chose to do so, however, does not determine whether the plaintiff in this case has suffered an injury.

the provisions-- sanctions that Hassan admittedly does not face-factors the Circuit found to support ripeness in that case also apply here. As in Signorelli, Hassan would "ha[ve] to make decisions in the immediate future that would be affected by the outcome of the lawsuit"; "the factual record would not be more fully developed at the later point"; and there is "no better time to determine the provision's constitutionality and minimize irreparable injury. " Id at 857 (citing *Blanchette v. Conn. Gen. Ins. Co.,* 419 U.S. 102 (1974)). And as explained above, Hassan's injury is one that he faces now, regardless of the outcome of the election. Therefore, the court finds his claims are ripe for review.

II. Merits

Article II, section I, clause 5, of the Constitution provides that:

> No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

With the exception of the Natural Born Citizen Clause, Hassan meets all of the other eligibility requirements for the office.[2] He makes several arguments in support of his claim that being a natural born citizen is no longer a constitutional requirement for the Presidency. Specifically, he argues that subsequent amendments to the Constitution--namely, the First, Fifth, Fourteenth, and Fifteenth Amendments-- "implicitly" repealed the Natural Born Citizen Clause.

Likely because of the rarity of such challenges, the Supreme Court has not established a test for determining whether or when one constitutional provision "trumps," as plaintiff argues, another. The Court has, however, on numerous occasions considered whether a statute has implicitly repealed another statute. "While a later enacted statute ... can sometimes operate to amend or even repeal an earlier statutory provision," the Court has held, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation marks and alterations omitted). Because implicit repeals are so highly disfavored, the Court "will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have

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[2] Hassan is now thirty-five years old, and he has been a resident of the United States for more than fourteen years.

any meaning at all. " *Id* (internal quotation marks and alterations omitted).

As the parties acknowledge, this approach to statutes could, in theory, apply to the Constitution. For example, the Supreme Court held that the Fourteenth Amendment partially abrogated Eleventh Amendment sovereign immunity, even though the text of the Fourteenth Amendment does not explicitly require that result. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment.") (citation omitted). The already rigorous test for implied repeal of a statute would be even more so in the constitutional context.[3]

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[3] Other courts have taken a different approach. In *New v. Pelosi*, 2008 WL 4755414 at *2 (S.D.N.Y. 2008), the court rejected a plaintiffs argument that the Fourteenth Amendment implicitly overruled the electoral college, because "as interpreter and enforcer of the words of the Constitution, [the court] is not empowered to strike the document's text on the basis that it is offensive to itself or is in some way internally inconsistent. In other words, the electoral college cannot be questioned constitutionally because it is established by the Constitution." (internal quotation marks omitted). *See also New* v. *Ashcroft*, 293 F. Supp. 2d 256, 259 (E.D.N.Y. 2003) (citing *Trinsey* v. *United States*, No. 00-5700, 2000 WL 1871697 at *3 (E.D.Pa. 2000)) *Hitson* v. *Baggett*, 446 F. Supp. 674, 676 (M.D. Ala. 1978) ("The discrimination of which plaintiffs complain (if it is discrimination) is ... a type of 'discrimination' specifically sanctioned by the Constitution. Thus, while this 'discrimination' may be considered by some to be unfair, it is hardly 'unconstitutional.'") (citations omitted)

But even assuming that a constitutional provision can, like a statute, be implicitly repealed, none of the amendments to the Constitution here implicitly repealed the Natural Born Citizen Clause. "[A] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrwn." *Nat'l Ass'n of Home Builders*, 551 U.S. at 663 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1978)). Particularly given the disfavor of implicit repeal in the statutory context, this court cannot imply intent to overturn a specific *constitutional* provision based only on generalized principles plaintiff draws from the First, Fifth, Fourteenth, and Fifteenth Amendments.

Hassan's argument that the First Amendment overrides the Natural Born Citizen Clause, for example, is easily dismissed. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." As an initial matter, the Natural Born Citizen Clause is not a "law" passed by Congress, but a constitutional provision. Even putting this difficulty aside, Hassan has not described any First Amendment rights that are "irreconcilable" with the Natural Born Citizen Clause. The First Amendment does not address the right to run for President, much less create a right for all citizens to be able to run for President. And Hassan has offered no indication that the First

Amendment was intended to overrule the Natural Born Citizen Clause, particularly given the short period of time between the passage of the Constitution and the enactment of the Bill of Rights.

Nor do the equal protection mandates of the Fifth and Fourteenth Amendments implicitly repeal the Natural Born Citizen Clause.[4] The Equal Protection Clause, Hassan argues, removed all distinctions between natural born and naturalized citizens and thus impliedly repealed the natural born citizen requirement. Hassan relies on *Schneider v. Rusk*, 377 U.S. 163 (1964), where the Supreme Court struck down a statute that denaturalized naturalized citizens who had resided three continuous years in the country of their birth after becoming American citizens. The Court, in considering whether the statute unconstitutionally discriminated against naturalized citizens, "start[ed] from the premise that the rights of citizenship of the native born and the naturalized person are of the same dignity and are co-extensive. " *Id.* at 165.

But *Schneider* hardly provides the emphatic proof Hassan would need to overcome the strong presumption against implicit repeal. On the

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[4] Although the Fifth Amendment, which applies to the federal government, does not have an equal protection clause, it has been interpreted as including the same principle. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

contrary, in *Schneider* itself, the Court recognized that "[t]he only difference drawn by the Constitution is that only the 'natural born' citizen is eligible to be President," not indicating any conflict between the provision and the Court's holding. *Id.* Other cases have acknowledged the constitutional distinction among citizens. *See Knauer v. United States*, 328 U.S. 654, 658 (1946) (naturalized citizenship "carries with it all of the rights and prerogatives of citizenship obtained by birth in this country, save that of eligibility to the Presidency") (internal quotation marks omitted); *Baumgartner v. United States*, 322 U.S. 665, 673 (1944) ("Under our Constitution, a naturalized citizen stands on equal footing with the native citizen in all respects save that of eligibility to the Presidency.") (quoting *Luria v. United States*, 231 U.S. 9, 22 (1913)).

The same is true of the Fifteenth Amendment, which provides, in part, that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Hassan argues that the Fifteenth Amendment encompasses the right to be voted for. But whether or not it does, the language of the Fifteenth Amendment itself does not "irreconcilably" conflict with the language of the Natural Born Citizen Clause. The Fifteenth Amendment simply cannot be interpreted to overrule the Natural Born Citizen Clause.

CONCLUSION

For the above reasons, defendant's motion to dismiss is GRANTED and plaintiff's motion for summary judgment is DENIED. The Clerk of Clerk is directed to close this case.

SO ORDERED.

Nina Gershon, U.S.D.J.

Dated: June 11, 2010
Brooklyn, NY

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ABDUL KARIM HASSAN,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA,

Defendant.

----------X

AMENDED JUDGMENT
08-CV-0948 (NG)

A Memorandum and Order of Honorable Nina Gershon, United States District Judge, having been filed on June 15, 2010, granting defendant's motion to dismiss; and denying plaintiff's motion for summary judgment; it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendant; that defendant's motion to dismiss is granted; and that plaintiff's motion for summary judgment is denied.

Dated: Brooklyn, New York
June 18, 2010

Robert C. Heinemann
Clerk of the Court

By: _____
Terry Vaughn
Chief Deputy of
Court Operations

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ JUN 17 2010 ★
BROOKLYN OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ABDUL KARIM HASSAN,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA,

Defendant.

----------X

JUDGMENT
08-CV-0938(NG)

A Memorandum and Order of Honorable Nina Gershon, United States District Judge, having been filed on June 15, 2010, granting defendant's motion to dismiss; and denying plaintiff s motion for summary judgment; it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendant; that defendant's motion to dismiss is granted; and that plaintiff's motion for summary judgment is denied.

Dated: Brooklyn, New York
June 15, 2010

ROBERT C. HEINEMANN
Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ABDUL KARIM HASSAN,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

----------X

Civ. Action #: 08-CV-0938(NG)(LB)

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that Abdul Karim Hassan ("Plaintiff-Appellant"), hereby appeal to the United States Court of Appeals for the Second Circuit, from a Judgment of the United States District Court for the Eastern District of New York, as amended, and filed and entered on June 21, 2010. Plaintiff-Appellant Hassan also appeals the Memorandum & Order upon which the judgment is based and which was filed/entered on June 15,2010 and signed by the Honorable Nina Gershon on June 11, 2010

The Judgment and the Memorandum and Order t appealed found that the Natural-Born Provision of the United States Constitution has not been implicitly repealed or trumped by the Fist, Fifth, Fourteenth and Fifteenth Amendments of the United States Constitution as Plaintiff-Appellant

had argued in his motion for summary judgment and in opposition to Defendant's motion to dismiss.

This appeal is taken from each and every part of the Judgment and Memorandum as described above as well as the whole thereof, except that Plaintiff-Appellant does not appeal the finding that Plaintiff-Appellant had standing to sue and that the case was ripe for adjudication.

Dated: Queens Village, New York
June 28, 2010

Respectfully submitted,

s/ Abdul Hassan
By: Abdul K. Hassan, Esq. (AH 6510)
Pro Se Attorney
215-28 Hillside Avenue
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Tel: (718) 740-1000
Attorney for Plaintiff-Appellant

TO: United Stated District Court, EDNY
(NOA via ECF -Filing Fee by Mail)
Clerk of Court
225 Cadman Plaza East
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United States Attorney, EDNY
(Via ECF and USPS First Class Mail)
By: Ms. Tiana A. Demas (TO 8989), Esq.
271 Cadman Plaza East, 7th Floor
Brooklyn, NY 11201
Attorneys for Defendant-Respondent

General Docket
Court of Appeals, 2nd Circuit

Court of Appeals Docket #: 20-2622
Nature of Suite: 1440 CIVIL RIGHTS – Other
Hassan v. United States of America
Appeal From: EDNY (Brooklyn)
Fee Status: Paid

Case Type Information:
1) Civil
2) United States
3) –

Originating Court Information:
District: 0207-1 : 08-cv-039
Trial Judge: Nina Gershon
Trial Judge: Lois Bloom, U.S. MagistrateJudge
Date Filed: 03/05/2008
Date Order/Judgment: 06/18/2010
Date NOA filed: 06/28/2010